

Mr. Cuthbertson

December 26. 1767.

Lockhart

22. June 1768.

*Find that Cuthbertson is still intitled
to receive the Lands
& Remit to the Ordry to
proceed accordingly.*

INFORMATION

FOR

Poor *George Cuthbertson*, late Merchant in
Lanerk,

AGAINST

Allan Lockhart of Cleghorn, Esq;

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THE above-named *George Cuthbertson* was formerly a Merchant in *Lanerk*, in tolerable Circumstances, and possessed of some heritable Subjects in that Town.

In 1733, *George Cuthbertson* purchased the Lands of old *Badronald*, from *Stephen Howieson* in *Stonehill*.

Only a small Part of the Price, about L. 10 Sterling, was paid by *George Cuthbertson* himself. For the Remainder, amounting to 3000 Merks, he was obliged to apply to the now deceased *Allan Lockhart of Cleghorn*. And, in order to induce *Cleghorn* to lend him the Money, he agreed to give him a Security, both upon the Lands of *Badronald*, and upon his heritable Subjects in the Town of *Lanerk*.

The Manner of executing their Agreement was this:

Instead of being disposed to *George Cuthbertson*, the Disposition to the Lands of *Badronald* was taken directly in the Name of Mr *Lockhart of Cleghorn* himself. *Cuthbertson* further granted him an heritable Bond for 500 Merks upon his Subjects in the Town of *Lanerk*. The Purpose of granting these

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Deeds

Deeds was explained by a Minute of Agreement entered into
Dec. 14. betwixt them, of even Date with the Disposition and heri-
1733. table Bond.

By this Agreement, *Cleghorn* became bound, " betwixt and
" the Term of *Martinmas* 1735, upon the Memorialist and
" his Heirs, their Payment and Performance as under-
written, and no otherwise, to make, grant, subscribe, and
" deliver to *George Cuthbertson*, his Heirs and Assignees, upon
" their own proper Charges and Expences, a valid and suffi-
cient heritable and irredeemable Disposition of all and
" haill his Lands of *Badronald*, with Houses, Biggings, &c.
" As also, the said *Allan Lockhart* of *Cleghorn* bound and
" obliged him, and his foresaids, to grant a valid and suffi-
cient Discharge and Renunciation to the said *George Cuth-
bertson*, and his foresaids, of a Debt of 500 Merks Scots of
" Principal, with the Annualrent and Expences, contained
" in an heritable Bond, granted by the said *George Cuthbertson*,
" with Consent of *Elizabeth Inglis* his Spouse, to the said
" *Allan Lockhart*, affecting his Heritage in *Middlegate* or
" *Cross-row* of *Lanark*; as also affecting the said *George
Cuthbertson* his Barn and Barn-yard, on the North Back-
" vennel of the said Burgh."

George Cuthbertson, on the other hand, " bound and
" obliged him, his Heirs, Executors, Successors, and Intromit-
ters with his Goods and Gear whatsoever, thankfully to
" content and pay to the said *Allan Lockhart* of *Cleghorn*,
" his Heirs, Executors, or Assignees, all and haill the Sum
" of 3000 Merks Scots Money, and that betwixt and the said
" Term of *Martinmas* 1735 Years."

Then follows this Clause, " And it is hereby agreed on be-
twixt the said Parties, That, if punctual Payment of the
" said 3000 Merks is not made by the said *George Cuthbert-
son*, and his foresaids, at the said Term of *Martinmas* 1735,
" then this present Agreement shall be *eo ipso* extinct, null,
" and void, to all Intents and Purposes, as if the same had
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" never been made, and both Parties for ever to be free
" of their mutual Performance each of them to others."

George Cuthbertson, finding it would be extremely inconvenient for him to advance the 3000 Merks, at the Time stipulated by the Contract, of this Date, entered into an Agreement with the now deceased *John Millar*, Merchant in *Leith*,<sup>Nov. 11.
1734.</sup> the Substance of which was, That *Millar* became bound to advance the 3000 Merks, to be paid to *Cleghorn* at the appointed Term of *Martinmas 1735*: That *Cuthbertson*, on the other hand, became bound to procure a Disposition in favours of *Millar* of the Lands of *Badronald*, redeemable by himself for Payment of 3000 Merks, at or before the Term of *Martinmas 1745*; till which Time he was to possess the Lands upon a Tack from *Millar*.

By this Contract, if it had taken place, besides having the Term of redeeming prorogated for ten Years longer, the Severity of the irritant Clause, directed against *George Cuthbertson*, upon his failing to make punctual Payment, would have been considerably diminished. By the Contract with *Cleghorn*, in the Event of not Payment, he was not only to lose all Right to the Lands of *Badronald*, but was also to forfeit 500 Merks secured upon his Heritage in the Town of *Lanerk*. But by this Contract with *John Millar*, he could in all Events, only be deprived of his Right to the Lands of *Badronald*.

Upon the Term of *Martinmas 1735*, the Day fixed by the Contract with *Cleghorn*, *George Cuthbertson*, alongst with *Millar*, appeared before *Cleghorn*, and offered him, under Form of Instrument, the full Sum of 3000 Merks, upon his granting, as they required him to do, a Disposition to the Lands of *Badronald*, and a Renunciation of the heritable Bond in Terms of the Agreement. This, however, *Cleghorn* absolutely refused to do, upon Pretence, that Inhibitions had been execute at the Instance of sundry of *Cuthbertson's* Creditors, which, as he alledged, had been duly intimated

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to him. All this is clearly established by an Instrument of Protest, taken upon this Occasion, in the Hands of a Notary-public, and produced in Proces.

Cleghorn having in this Manner refused to implement his
 Jan. 19. Agreement, *Cuthbertson* caused register the Minute of A-
 1736. greement, and thereon charged him with Horning; upon
 which *Cleghorn* presented a Bill of Suspension; and upon
 Jan. 24. Application of the Charger, it was remitted to the late
 1736. Lord *Coupar*, to discuss the Reasons of Suspension upon the
 Bill.

Cleghorn's Reasons of Suspension were in substance the same with what had been set forth in his Answers to the Protest. He still insisted, that as the Inhibitions, at the Instance of *Cuthbertson's* Creditors, had been formally intimated to him, he was not *in tuto* to grant any Disposition till these Inhibitions were taken away. A more frivolous Pretext than this, can hardly be imagined; for although an Inhibition at the Instance of the Creditors of a Wadsetter, may prevent him from granting any Disposition to their Prejudice, even to the Reverser offering to redeem; yet surely it could never enter into any Person's Head to imagine, that an Inhibition execute against the Reverser, was to prevent him from redeeming Lands impignorated for much less than their Value, and thereby enlarging the Funds of his Creditors.

Accordingly the Lord *Coupar* Ordinary, after hearing Par-
 Feb. 10. ties, pronounced the following Interlocutor: "Repels the
 1736. " Reasons of Suspension founded upon the Inhibitions against
 " the Charger, in respect of the Answer. And finds, That
 " upon Payment to the Suspender of the above Sum of 3000
 " Merks, and Annualrent due thereupon; he ought to de-
 " nude of the said Lands of *Badronald*, and renounce the
 " foresaid heritable Bond, and Infestment of Annualrent;
 " and finds the Letters orderly proceeded; and decerns in
 " these Terms."

Thereafter, at a subsequent Calling, his Lordship pronounced
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this second Interlocutor: "Adheres to the former Interlocutor, Feb. 21.
 " with this Alteration, That the Charger, on or before the 1736.
 " Term of *Whitunday* next, make Payment to the Suspender
 " of the above Sum of 3000 Merks, and Interest that shall
 " be due thereupon at the Time, and of 20 Pounds *Scots*
 " of Expences. And upon his so doing, finds the Suspender
 " ought to denude of the above Lands of *Badronald*, and
 " renounce the foresaid Infestment; and allows the Decree
 " formerly pronounced, to be extracted in these Terms."

George Cuthbertson had it not in his Power to make Payment of the 3000 Merks, at the precise Time mentioned in this Interlocutor. *Millar*, the Person on whom he relied, and who had come under an express Engagement, to advance the Money for redeeming the Lands of *Badronald*, disappointed him entirely; and he himself had by this Time been reduced to great Necessity, by a Train of most rigorous Diligence, at the Instance of *Cleghorn*. He was first ejected from the Lands of *Badronald*, which he had hitherto been allowed to possess by virtue of a Tack from *Cleghorn*; and was next turned out of his own proper Heritage in the Town of *Lanerk*, over which he had granted the heritable Bond already mentioned.

In this necessitous Situation, *Cuthbertson* remained for many Years. Although he might have got some well-disposed Person to advance for him the Money, which was greatly beneath the real Value of the Lands; yet he well knew, that as the Time appointed for redeeming had been allowed to elapse, the Money would never be accepted of by *Cleghorn*, without a Law-suit; and a Law-suit he also knew, was a Thing which at this Time, it was absolutely impossible for him to mantain.

At length being advised, that as the Irritancy was of a penal Nature, it was still competent for him to redeem, after making Payment of what should still be found to remain due of the 3000 Merks and Interest, of which Sum

the greatest Part was in all Probability already extinguished, by Intromissions with the Rents of *Badronald*, and of his Subjects in *Lanerk*: A Summons was raised in his Name for reducing the foresaid heritable Bond, and the subsequent Agreement with *John Millar* in *Leith*; and concluding also for having the Proceedings in the Suspension before Lord *Coupar*, wakened and transferred against the present *Allan Lockhart of Cleghorn*, Nephew and Representative of that *Allan Lockhart*, with whom the Agreement had been made.

After some Proceedings in the Reduction, and after Decree of Certification had been obtained against the Representatives of *John Millar*, it was judged a more regular and adviseable Form of Proceeding, to go on in the Process of Suspension now wakened and transferred in *statu quo*; and to desist at present from insisting on the Conclusion for reducing the foresaid heritable Bond, because if *Cuthbertson* shall be found intitled to redeem the Lands of *Badronald*, the Redemption Money will be diminished to the Extent of *Cleghorn's* Intromissions with the Rents of the Subjects in *Lanerk*.

Accordingly Application being made to your Lordships, in name of *George Cuthbertson*, the Cause was remitted to the Lord Justice-Clerk, as Ordinary, in room of Lord *Coupar*.

After hearing Parties, and advising Minutes of Debate, his Lordship made Avisandum to the whole Lords and appointed Informations. This is humbly offered in behalf of *George Cuthbertson*, who, in the Sequel, shall be called the Charger.

The short Question betwixt the Parties is, Whether is it still competent for the Charger to redeem the Lands of *Badronald*, upon making Payment of what shall still be found to remain due of the 3000 Merks; although the Time limited by the Agreement has been long since allowed to elapse.

That the Clause in the Agreement above recited, whereby it is declared, that if the Charger did not make Payment of the 3000 Merks, at or before Martinmas 1735, his Right

Right of Redemption, and *Cleghorn's* Obligation to convey the Lands to him, and to renounce the heritable Bond, should, in that Event, become entirely void, was an Irritancy of a highly *penal* Nature, will hardly be disputed: All that *Cleghorn* advanced was 3000 Merks; and in case this 3000 Merks was not punctually repaid to him on the Day appointed, he was not only to keep the Lands of *Badronald*, which were worth more than that Sum, and for which the Charger had in Fact paid somewhat more, but was also to have 500 Merks of clear Profit secured to him, upon the Charger's own proper Heritage in the Town of *Lanerk*. Upon looking back to the Agreement before-recited, your Lordships will see, that this is the plain Import of it.

Such being the Case, the Charger is advised, that the irritant Clause in the Agreement, whereby his Right of Redemption was to be cut off, unless exercised within a short limited Time, could not be effectual till it was formally declared in a proper Action before your Lordships. This is a Point so well established, as not to stand in need of any Argument to support it.

The single Difficulty therefore in this Case, arises from the second Interlocutor of Lord *Coupar*, above mentioned, whereby his Lordship "adhered to the former Interlocutor, with "this Alteration, that the Charger, on or before the Term "of *Whitsunday* next," i. e. *Whitsunday* 1736, "make Pay- "ment to the Suspender of the above Sum of 3000 Merks, "and Interest, that shall be due thereupon at the Time, "and of L. 20 *Scots* of Expences; and upon his so doing, "found the Suspender ought to denude of the above Lands "of *Badronald*, and renounce the foresaid Infestment." The Suspender argues, that as this Interlocutor was not precisely complied with, the Right of redeeming is for ever excluded.

But, with all Submission, this would be giving by far too great an Effect to this Interlocutor. The same Effect indeed

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as if it had been a formal Decree of Declarator obtained at the Instance of *Cleghorn*.

If a Person like *Cleghorn*, who holds a redeemable Right, wants to have the Power of Redemption effectually put an End to, the Law has pointed out to him a Method extremely plain and simple. He must raise an Action of Declarator before your Lordships, setting forth, that the Irritancy has been incurred, and if a Decree in that Action, declaring the Irritancy is obtained and extracted, the Power of Redemption is cut off for ever beyond Doubt. In the present Case, however, *Cleghorn* did not think proper to follow out this Method. The Interlocutor founded upon was pronounced in a Process very different from a Declarator of Irritancy. The Interlocutor, it will also be observed, allows the Charger to redeem at or before the Term of *Whitsunday* then next: But it is not expressly said, That if the Charger does not exercise this Privilege, he shall be cut out of the Right of redeeming in all Time coming; and your Lordships, it is hoped, will not chuse to establish a most rigorous Irritancy, merely by Implication, where no such Thing is expressed, and perhaps was not meant. The Case of the Charger will indeed be singularly hard, if he is to be subjected in an Irritancy which will deprive him of a most valuable Reversion, being all that he has in the World, merely in consequence of an Interlocutor pronounced incidentally in a Process of Suspension, in which the Irritancy was not the Question in Issue betwixt the Parties, and without having been put upon his Guard, as the Law has directed, by a formal Action of Declarator brought against him.

It is, in the next Place, submitted to your Lordships, although this Interlocutor is to be held equivalent to a formal Decree pronounced in a Declarator of Irritancy; yet as it never was extracted, whether it would not still be competent for the Charger to be admitted to redeem, upon assigning any reasonable Cause for his former Failure? It is thought, that

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an Application of this kind to your Lordships would be competent, even in a Declarator of Irritancy, at any Time before Extract: And accordingly, your Lordships are frequently in use, in Cases of this kind, to insert a *proviso*, that the Decree shall not be extracted for some Weeks past the usual Time; in order that, in the mean time, the Irritancy may be purged by offering Payment. The Reasons of the Charger's having failed to make Payment on the precise Day mentioned in Lord *Coupar's* Interlocutor, have already been explained to your Lordships: *John Millar*, the Person who had come under express Engagements to pay the Money, and to whom the Charger entirely trusted, disappointed him; and he himself was effectually disabled from doing it, by a Series of most rigorous Diligence at the Instance of *Cleghorn*, by which he was reduced to extreme Indigence.

But what seems to put this Matter beyond a Doubt, is a Circumstance already mentioned. The Charger, in Fact, has not incurred any *mora*: The Failure lies entirely on the other Side. Upon the 8th of *November 1735*, the Day appointed by the original Agreement, the Charger did make a Tender to *Cleghorn* of the whole 3000 Merks, upon his implementing the Agreement upon his Part, by granting a Disposition of the Lands of *Badronald*, and renouncing the heritable Bond: This, however, *Cleghorn* refused to do, upon Pretences the most frivolous, and which were immediately after over-ruled. This Offer would have had the Effect of keeping the Reversion open, although the Contract had been an equal one; much more when the Irritancy was so exorbitantly penal. The Plea indeed that is maintained by the other Party, must here appear in a very extraordinary Light. He is maintaining, that the culpable *mora* of his Predecessor, at the Term of *Martinmas 1735*, in refusing to accept of the Money, when duly offered to him, in Terms of the Agreement, shall have the Effect of securing to him the Possession of Subjects worth a great deal more than that Sum, and of depriving the Charger,

Charger, who was not in *mora*, and who would have fulfilled the Agreement, of the Benefit of a very lucrative Reversion.

When all the Circumstances of this Case are considered, it is hoped your Lordships will be of Opinion, that it is still entire for the Charger to redeem the Lands of *Badronald*, by making Payment of 3000 Merks, with Interest from *Martinmas* 1735, or such Part of that Sum as shall be found still to remain due after accounting for the Rents.

In respect whereof, &c.

ROBERT BLAIR.

